ed an unaddressed notice purportedly issued under section 72 of the Act and signed by someone on behalf of the Pengarah, Bangunan Bangunan, Majlis Perbandaran, Pulau Pinang, which was put in by consent and marked "A". Assuming, for the sake of argument, that this constitutes proof of such contravention by the Defendant, I do not consider that that would by itself debar the Defendant from the interim relief which he now seeks. In the first place, the Plaintiff as owner of the premises may well be equally liable with the Defendant for such contravention. There is no evidence that she did anything to prevent the Defendant from making the additions and alterations concerned, apart from no doubt complaining to the Local Authority about it but this could easily have been after the disputes arose and might well be considered a self-serving act on her part as counsel for the Defendant has suggested. In the second place, there is no universal rule that a party claiming equitable relief whose conduct is open to criticism on moral or other grounds is for that reason debarred from obtaining relief. The standard of cleanliness required by the equitable maxim must depend upon the circumstances of the case and, specifically, the relief sought: (See e.g. *Argyll (Duchess)* v. *Argyll (Duke)*[6] and *Ford* v. *Foster*)[7].

As I have said, the Defendant here is in effect asking for an interim injunction to restrain harassment and to compel the Plaintiff to allow him peaceful re-entry and enjoyment of the premises pending the determination of the suit. I do not see how, what may well be a minor breach of the Street, Drainage & Building Act, 1974, which the Defendant could easily rectify, if given the chance, should debar him from the interim relief he seeks especially when other considerations have been found in his favour for the reasons already stated.

The result, therefore, is that the Plaintiff's application is refused whilst that of the Defendant is granted upon the usual undertaking as to damages. There will accordingly be orders for an injunction so as to enable the Defendant to go back to the premises and an injunction to prevent the Plaintiff, her servants or agents or any of them or otherwise howsoever from stopping him having access thereto until after judgment in this action. The Plaintiff will have to pay the costs of both applications to the Defendant but there will be an order for early trial.

Order accordingly.

Solicitors: *Tan Beng Hong & Co.; Ch'ng Theam Inn & Co.*

GURDIT SINGH v. PUBLIC PROSECUTOR

[A. Cr. J. (Mohamed Dzaiddin J.) November 22, 1982]

[Kuala Lumpur – Federal Territory Criminal Appeal No. 104 of 1982]

Criminal Law & Procedure – Appeal against sentence – Prosecution sought for substitution of conviction from one under s. 454 to s. 380, Penal Code – Revisionary powers of Court – When court may exercise it. – Penal Code, ss. 380 & 454 – Criminal Procedure Code (F.M.S. Cap. 6) ss. 166, 167 & 325.

Criminal Law & Procedure – Revisionary powers – When Court may exercise it.

The appellant was convicted for an offence under section 454 of the Penal Code and sentenced to 4 years' imprisonment. He appealed against sentence. The Prosecution pointed out that from the evidence in the Appeal Record, the appellant could not have been convicted for an offence under section 454, Penal Code. Instead, he should have been convicted for theft in a dwelling house under section 380 of the Penal Code. The Prosecution requested the court to exercise its revisionary powers under the Criminal Procedure Code by substituting a conviction for a charge under section 380, Penal Code.

Held: (1) in order to satisfy the requirements of sections 166 and 167 of the Criminal Procedure Code, the two main tests as laid down in *Lew Cheok Hin* v. *R.*[3] must be satisfied;

(2) applying these two tests to the present case, the unframed charge was available, but the trial Magistrate failed to scrutinize carefully the effect of the evidence of P.W.1 when he stated that he saw the accused coming out from the back part of his towkay's house. P.W.1 stressed the fact that he saw the accused coming out from the compound and not from the house. For this reason alone the accused should have been convicted for theft in a dwelling house;

(3) the evidence has raised the same issues of fact, i.e. theft, which is relevant to both sections 454 and 380 of the Penal Code;

(4) the requirements of sections 166 and 167 of the Criminal Procedure Code are satisfied;

(5) the court therefore allowed the substitution of the conviction to one under section 380 of the Penal Code and reduced the sentence to 3 years' imprisonment.

Cases referred to:

(1) *R.* v. *Lachiram* I.L.R. 283 Bom. 533, 566.
(2) *Sivalingam* v. *Public Prosecutor* [1982] 2 M.L.J. 172.
(3) *Lew Cheok Hin* v. *R.* [1956] M.L.J. 131, 132.

CRIMINAL APPEAL.

Appellant in person.

Mohamed Shafee bin Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: This is an appeal against sentence. The appellant was charged at Jalan Duta Magistrate's Court on June 26, 1982 for an offence under section 454 Penal Code (house-breaking in order to commit theft) and claimed trial. He was subsequently convicted and was sentenced to four years' imprisonment.

His sole ground of appeal is that the sentence is manifestly harsh. At the onset of the proceeding, the learned Deputy Public Prosecutor pointed out that from the evidence in the Appeal Record, the appellant could not have been convicted for an offence under section 454 Penal Code. Instead, he should have been convicted for theft in a dwelling house punishable under section 380, Penal Code. He has therefore asked me to exercise my revisionary powers under the Criminal Procedure Code by substituting a conviction for a charge under section 380, Penal Code.

My powers of revision are provided under section 325 of the Criminal Procedure Code. These powers are consistent with section 31 of the Courts of Judicature Act 1964. There are a number of authorities with regard to the powers of revision. In *Mallal's* Criminal Procedure, Fourth Edition, p. 482, it is stated as follows:

"The powers of revision are given to the High Court alone, and the powers of revision are given to the High Court in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. Their Lordships are clearly of opinion that when the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed, and the High Court can then, though the record has only come to its knowledge in the appellate proceeding, proceed to exercise its revision powers if it chooses to do so," per Lord Atkin in *Chunbidya* v. *R.*, L.R. 62 I.A. 36; A.I.R. 1935 P.C. 35.

The principles which should guide the Courts in the exercise of the revisionary powers have been clearly set out by Jenkins C.J. in *R.* v. *Lachiram,*[1] see *Mallal's* Criminal Procedure, Fourth Edition, at p. 482.

Now, the next question for me to decide is whether or not I am permitted under the law to alter the conviction for another offence, i.e. under section 380 of the Penal Code. The powers of the Judge of a High Court in an appeal against sentence to alter a finding is found in section 316(b) of the Criminal Procedure Code where it is stated that at the hearing of the appeal the Judge may in an appeal as to sentence –

(i) reverse the finding and sentence and acquit or discharge the accused, or

(ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence.

In *Sivalingam* v. *Public Prosecutor*[1], the Federal Court in a reference on a question of law of public interest held that in hearing an appeal from a conviction the power of the Judge to alter a finding must be exercised subject to sections 166 and 167 of the Criminal Procedure Code. It is stated that the requirements of sections 166 and 167 of the Code must be satisfied before a High Court in the exercise of its appellate jurisdiction alters or substitutes a conviction for a different offence. It is further held that to warrant a substitution there must be clear evidence that a case for the substituted offence would have been made out or established in the court below. In the case referred to, the accused was convicted and sentenced for an offence under section 420 (cheating) of the Penal Code in the lower court. He then appealed against conviction and sentence to the High Court. The appellate Judge found that an offence under section 420 was not proved, but was satisfied that an offence under section 409 (criminal breach of trust) had been established. He therefore substituted the charge to one under section 409 of the Penal Code. He dismissed the appeal and maintained the conviction and sentence.

On reference to the Federal Court, Abdul Hamid F.J. said as follows:

"Our law clearly allows the Judge of a High Court in an appeal against conviction to alter a finding. Section 316(b) provides that power. This is consistent with section 26 of the Courts of Judicature Act which states that the appellate criminal jurisdiction of the High Court shall consist of the hearing of appeals from Subordinate Courts according to any law for the time being in force within the territorial jurisdiction of the High Court. Certain provisions of the Criminal Procedure Code general in nature are also relevant for purposes of hearing such appeals. Sections 166 and 167 of the Criminal Procedure Code are examples of such provisions. In hearing an appeal from a conviction the power of the judge to alter a finding must in our view be exercised subject to sections 166 and 167 of the Criminal Procedure Code.

The requirements of sections 166 and 167 of the Criminal Procedure Code must be satisfied before a High Court in the exercise of its appellate jurisdiction alters or substitutes a conviction for a different offence. Although therefore an appellate court is possessed of the power which it can

lawfully exercise, it is equally essential that such power be exercised within the confines of the law. The question is to what extent and under what circumstances such power can be invoked. What is clear in our minds is, and we emphasise, that such power must be exercised under limited circumstances and with great caution subject to the restriction imposed by section 167 of the Criminal Procedure Code, and it must be done so as not to prejudice the case of an accused.

In our view *Ng Ee's case* was correctly decided and to warrant a substitution there must be clear evidence that a case for the substituted offence would have been made out or established against the accused in the court below. To put it in another way before there can be an alteration of a finding the appellate court must be satisfied that if the substituted charge had in fact been the original charge, the proceedings at the trial, would have taken the same course, and the evidence recorded have been same. Further, if the substituted charge was one of the charges preferred against the accused or was an alternative charge the prosecution evidence would have been sufficient to satisfy the elements to constitute the charge and the accused's evidence must have been substantially unchanged in that the accused's defence would have been the same."

In the instant case, the appellant was charged and convicted under section 454 of the Penal Code. For this offence, the prosecution has to prove the following ingredients:–

(1) that the accused committed house-breaking, the elements of which are contained in section 445 of the Penal Code; and

(2) that he did so in order to commit theft.

According to the evidence of Sitiamparam a/l Marimuthu (P.W.1), he said he saw the accused leaving the compound of the complainant's house at the time of the commission of the offence. He suspected the accused has stolen something. He then informed the towkay's wife. Both of them then gave chase and managed to stop the accused who threw away the slingbag. Under cross-examination, P.W. 1 also stated that he saw the accused leaving the compound of his towkay's house. P.W.1 was the only eye-witness who saw the accused coming out of the said compound. In such circumstances, it is clear that the act of the accused could not have constituted an offence of house-breaking under section 454 of the Penal Code. The learned trial Magistrate should have considered this point at the close of the prosecution case. In this regard, let me remind all trial Magistrates of their duty:

"It is the duty of the court to scrutinise the charge at the commencement of every summary trial. An amendment may be made at any stage and, in general, the earlier the better but it is at the close of the evidence for the prosecution that the court is in the best position to decide exactly what is the case which the accused is required to meet. It is therefore the express statutory duty of the lower Courts to consider every charge at that stage and if necessary to amend it then. This is a point of forensic procedure and quite apart from the legal provisions regarding the framing of charges which relate mainly to practice in the prosecutor's chambers. It is a mandatory provision which should always be strictly observed."

Per Taylor J. in *Lew Cheok Hin* v. *Reg*[3]

Now, coming back to the present case, to warrant a conviction under section 380 of the Penal Code, the prosecution must prove the following ingredients:–

(1) that the subject-matter of theft is moveable property, i.e. a lady's slingbag;

(2) that it was in possession of a person;

(3) that the accused moved it dishonestly;

(4) that he did so without the consent of the person;

(5) that he did so intending to take it out of his possession;

(6) that the property stolen was from a building used as a dwelling house.

In my view, the main and necessary ingredient present in both section 380 and section 454 of the Penal Code is the commission of theft. In order to satisfy the requirements of sections 166 and 167 of the Criminal Procedure Code, there are two main tests required:

"First, the facts must be such that the unframed charge was available from the start and could have been framed and tried concurrently under section 165; secondly, the evidence must have been presented in such a way as to raise all the same issues of fact as would have been raised had the unframed charge been framed and trial claimed on it. Not only must the evidence for the prosecution be the same but the Court must be satisfied that the evidence for the defence would also have been the same."

Per Taylor J. in *Lew Cheok Hin* v. *Reg. (supra)* p. 134.

Applying these two tests to the present case, the unframed charge was available, but the learned trial Magistrate failed to scrutinise carefully the effect of the evidence of P.W.1 when he stated that he saw the accused coming out from the back part of his towkay's house. P.W.1 stressed the fact that he saw the accused coming out from the compound and not from the house. For this reason alone, the accused should have been convicted for theft in a dwelling house. Secondly, the evidence

has raised the same issues of fact, i.e. theft, which is relevant to both sections 454 and 380 of the Penal Code. Therefore, applying the above principle and on the authority of *Sivalingam* v. *Public Prosecutor (supra),* I am of the opinion that the requirements of sections 166 and 167 of the C.P.C. are satisfied. As such, I substitute the conviction to one under section 380 of the Penal Code and reduce the sentence to three years' imprisonment.

Order accordingly.

PUBLIC PROSECUTOR v. CHAI CHONG YIN & ANOR.

[O.C.J. (Mohamed Dzaiddin J.) November 26, 1982]
[Kuala Lumpur – Selangor Criminal Trial No. 1 of 1982]

Criminal Law & Procedure – Possession of dangerous weapons – Charge for offences under Internal Security Act 1960 – Consent to prosecute under I.S.A. – Objection to amended charges – Whether any amendment of charge must be within consent of Public Prosecutor.

Internal Security – Possession of dangerous weapons – Internal Security Act 1960, s. 57(1)(a) & (b).

The two accused were jointly charged on amended charges for being in control of a pistol and ammunition without lawful excuse and authority and therefore had committed offences under the Internal Security Act 1960, s. 57(1)(a) & (b).

Counsel for both accused raised preliminary objections in respect of the amended charges. Both the first and the second accused were originally charged at the material time, date and place for being in control of the same pistol except the serial number for the Llama pistol was registered as 934383 and one primed home-made handgrenade toge ther with a total of 88 rounds of live .32 ammunition. On March 14, 1981 the Public Prosecutor issued his consent to prosecute under s. 80 of the Internal Security Act and the accused were subsequently committed for trial on June 30, 1982.

Counsel for the accused referred to the amended charges in particular the serial number which was altered to 984383 and the total number of .32 ammunition being 96. He submitted that any amendment of the charge must be within the consent of the Public Prosecutor. If not, the proceeding was a nullity. The accused should be entitled to a discharge not amounting to an acquittal for the proceeding to be regularised.

Held: (1) under section 80 of the Internal Security Act 1960, the prosecution shall not be instituted except with the consent of the Public Prosecutor. Unlike a charge, section 80 does not provide any particular form of consent. There is no requirement under the said Act that the material particulars to the offence must be specifically stated or particularised in the consent;

(2) having regard to the case as a whole, the defence had not raised any reasonable doubt in the prosecution case. In the circumstances both accused were guilty of the charge and accordingly sentenced to death.

CRIMINAL TRIAL.

Gooi Soon Seng (Deputy Public Prosecutor) for the Public Prosecutor.

Karpal Singh (*Ngeow Yin Ngee* with him) for the 1st and 2nd Accused.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: Both the first and second accused are jointly charged on amended charges for being in control of one .32 pistol of Astra brand and fifty-three rounds of .32 ammunition and one .32 pistol of Llama brand serial No. 984383 and forty-three rounds of .32 ammunition without lawful excuse and authority in house No. 7196, Taman Selayang, Gombak, Kuala Lumpur, at about 7.30 p.m. on June 18, 1977 and therefore have committed offences under Section 57(1)(a) and 57(1)(b) of the Internal Security Act 1960.

At the onset of the proceeding, Mr. Karpal Singh, counsel for both accused, raised preliminary objections in respect of the amended charges. Both the first and second accused were originally charged at the material time, date and place for being in control of the same pistols except the serial number for the Llama pistol was registered as 934383 and one primed home-made handgrenade together with a total of eighty-eight rounds of live .32 ammunition. On March 14, 1981 the Public Prosecutor issued his consent to prosecute under Section 80 of the ISA (Exhibit P.1) and the accused were subsequently committed for trial on June 30, 1982.

Mr. Karpal Singh drew my attention to the change in the particulars of the items as appearing in the amended charges and, in particular, he referred to the serial number being now stated as 984383 and the total number of .32 ammunition being ninety-six. He submitted that any amendment of the charge must be with the consent of the Public Prosecutor (Exhibit P.1). There should be committal on the basis of fresh consent. If not, the proceeding is a nullity. The accused should be entitled to a discharge not amounting to an acquittal for the proceeding to be regularised.